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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

ANA MARIA DULANTO et al.,

Plaintiffs and Appellants,

v.

REBECCA MARIE KUHN et al.,

Defendants and Respondents.

B285636

(Los Angeles County
Super. Ct. No. BC636845)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Ana Maria Dulanto and Jose Manuel Dulanto, in pro. per.,
for Plaintiffs and Appellants.

Madden, Jones, Cole & Johnson and Ian Chuang for
Defendants and Respondents.

Plaintiffs and appellants Ana Maria Dulanto (Ana) and Jose Manuel Dulanto (Jose)¹ appeal from the judgment of dismissal entered against them and in favor of defendants and respondents Rebecca Marie Kuhn (Kuhn) and ProHealth Partners, a Medical Group, Inc. (ProHealth)² after the trial court issued an order granting terminating sanctions against plaintiffs for failing to comply with a discovery order and denied plaintiffs' motion for reconsideration of the terminating sanctions order. We affirm the judgment.

BACKGROUND

Complaint and answer

Plaintiffs (who were then represented by counsel) commenced this action in October 2016, alleging causes of action for negligence, negligent infliction of emotional distress, gross negligence, and loss of consortium arising out of an injury Ana allegedly sustained from a needle while giving an injection to an AIDS patient on October 13, 2014. At the time of her alleged injury, Ana was employed by Argus Management Company, LLC. Ana filed a workers' compensation claim against Argus for her alleged injury.

After defendants filed an answer to the complaint, the parties stipulated, through their respective counsel, to an order allowing defendants to file a first amended answer. The amended answer asserted, as an additional affirmative defense,

¹ Ana and Jose are referred to collectively as plaintiffs. Because plaintiffs share the same surname, we refer to them individually by their first names to avoid confusion.

We further note that plaintiffs are both pro. per. on appeal. Only Jose appeared at oral argument for himself alone.

² Kuhn and ProHealth are referred to collectively as defendants.

that the California Workers' Compensation Act was the sole and exclusive remedy for plaintiffs' claims.

Defendants also asserted that defense in a January 24, 2017 letter to plaintiffs' attorney, stating that their investigation had revealed that Ana was an employee of both Argus and ProHealth, and that Kuhn was an employee and shareholder of ProHealth. Defendants provided copies of the relevant portions of a management services agreement between Argus and ProHealth and copies of a workers' compensation insurance policy under which both Argus and ProHealth were named insureds. Defendants stated their intention to move for summary judgment on the ground that the Workers' Compensation Act barred plaintiffs' claims.

Plaintiffs' failure to respond to discovery

On January 24, 2017, defendants served form interrogatories on both Ana and Jose and requests for admission on Ana. Plaintiffs failed to respond to the discovery requests by the February 28, 2017 due date. On March 3, 2017, defendants' counsel emailed plaintiffs' attorney granting a unilateral extension, until March 15, 2017, to respond to the propounded discovery. Plaintiffs' counsel did not respond to that email, and no discovery responses were served. On March 16, 2017, defendants' counsel sent a letter to plaintiffs' attorney stating that defendants would file a motion to compel and a request for sanctions if plaintiffs did not serve verified responses, without objections, to the propounded discovery by March 20, 2017. Plaintiffs served no responses, and on March 24, 2017, defendants' counsel used the superior court's online reservation system to reserve June 7, 2017 as the first available hearing date for a motion to compel responses.

Motions to compel and ex parte application to advance the hearing date on motions

At a March 27, 2017 case management conference, the trial court set a trial date of November 20, 2017. On March 28, 2017, defendants informed plaintiffs' attorney that they intended to file an ex parte application for an order advancing the hearing date on the motion to compel, or alternatively, to continue the trial date. On March 30, 2017, defendants filed an ex parte application in which they explained that a June 6, 2017 hearing date on their motion to compel would not allow them sufficient time to complete the discovery needed for a summary judgment motion. The trial court granted defendants' ex parte application and advanced the hearing date on the motion to compel discovery responses to April 24, 2017.

On April 6, 2017, defendants filed motions for an order compelling plaintiffs to serve verified responses, without objection, to defendants' form interrogatories and establishing the truth of the matters specified in the requests for admissions. Defendants also requested monetary sanctions against plaintiffs. Plaintiffs filed no written opposition to the discovery motions; however, plaintiffs' counsel and Jose both appeared at the April 24, 2017 hearing on the motions.

Trial court's discovery order

At the April 24, 2017 hearing, the trial court granted defendants' motions and issued an order requiring plaintiffs to serve verified responses, without objection, to the form interrogatories within 10 days; establishing the truth of the matters specified in the requests for admissions; requiring Ana to provide verified admissions within 10 days; and requiring plaintiffs to pay \$2,720 in monetary sanctions within 30 days. The trial court denied plaintiffs' ex parte application to substitute themselves as pro. per. litigants in place of their counsel of

record, L. Walker Van Antwerp, and to continue all filing deadlines and discovery due dates for 90 days.

Motion for terminating sanctions

Plaintiffs failed to comply with the trial court's discovery order, and defendants filed a motion for terminating sanctions on May 11, 2017.

On May 23, 2017, plaintiffs filed a motion in pro. per. for reconsideration of the April 24, 2017 discovery order. Attached as an exhibit to the motion were purported responses to the discovery requests.

On June 14, 2017, the trial court denied plaintiffs' motion for reconsideration on the grounds that it was untimely and failed to set forth new facts or law. The trial court noted that the motion should have been brought by counsel of record and that the proof of service for the motion was defective.

On July 7, 2017, the trial court heard and granted the motion for terminating sanctions. On July 27, 2017, the trial court issued a written order granting the motion for terminating sanctions and dismissing with prejudice plaintiffs' complaint. This appeal followed.

DISCUSSION

I. Terminating sanctions

A. Applicable law and standard of review

"A trial court may impose sanctions, including terminating sanctions, for a party's misuse of the discovery process, which includes disobedience of a court order. [Citation.]" (*Sole Energy v. Hodges* (2005) 128 Cal.App.4th 199, 207.) Failing to respond to an authorized method of discovery and disobeying a court order to provide discovery are both misuses of the discovery process. (Code Civ. Proc., § 2023.010, subds. (d), (g).)

A willful failure to comply with a court order is a prerequisite for the imposition of terminating sanctions. (*Biles v.*

Exxon Mobil Corp. (2004) 124 Cal.App.4th 1315, 1327.) Willfulness in this context does not require a wrongful intention. A simple lack of diligence may be deemed willful when the party knew there was an obligation, had the ability to comply, and failed to do so. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 787.) The party with the obligation to respond bears the burden of showing that the failure to respond was not willful. (*Cornwall v. Santa Monica Dairy Co.* (1977) 66 Cal.App.3d 250, 252-253.)

A trial court's order for terminating sanctions is reviewed for abuse of discretion. (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) Under this standard, the order may be reversed on appeal only if it is arbitrary, capricious, and exceeds the bounds of reason. (*Lang v. Hochman* (2000) 77 Cal.App.4th 1225, 1244; *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545.) The party challenging the trial court's order has the burden of demonstrating an abuse of discretion. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487, disapproved on other grounds by *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.)

B. No abuse of discretion

Plaintiffs fail to meet their burden of showing any abuse of discretion by the trial court. The record shows that on January 24, 2017, plaintiffs were served, through their counsel, with requests for admission and form interrogatories. Plaintiffs failed to serve any responses by the February 28, 2017 due date for that discovery, by end of the two-week extension defendants unilaterally granted to plaintiffs, or by the March 20, 2017 deadline defendants set before filing the motions to compel. Plaintiffs then failed to comply with the trial court's April 24, 2017 order requiring them to serve verified responses and admissions and to pay monetary sanctions. The trial court's

imposition of terminating sanctions was not an abuse of discretion.

We reject plaintiffs' argument they are not to blame for the failure to comply because their attorney failed to prepare and serve the necessary discovery responses. In the context of discovery sanctions, ““. . . the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief.” [Citations.]” (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 231.) Only an attorney's “positive misconduct which effectively obliterates the existence of the attorney-client relationship” will relieve the client from the consequences of his or her attorney's mistakes. (*Ibid.*) Even an attorney's willful failure to comply with a discovery order does not come within the “positive misconduct” exception. (*Ibid.*) The record shows, moreover, that plaintiffs were aware of the trial court's discovery order, as Jose was present at the April 24, 2017 hearing at which the trial court issued that order. Plaintiffs fail to meet their burden of showing that their failure to comply with the discovery order was not willful.

C. No procedural irregularities

Plaintiffs' argument that procedural irregularities denied them due process and invalidated the terminating sanctions order is equally unavailing. The record discloses no procedural defects in defendants' March 30, 2017 ex parte application for an order advancing the June 7, 2017 hearing date on their motions to compel, or in the order granting the ex parte application and advancing the hearing date to April 24, 2017. Plaintiffs' counsel received notice of defendants' ex parte application and of the hearing on that application by telephone and by email two days before the ex parte hearing date. There is no evidence to support plaintiffs' contention that the proofs of service attached to defendants' motions to compel were fraudulent.

Plaintiffs' argument that the terminating sanctions order fails to "recite[] in detail the conduct or circumstances justifying the imposition of terminating sanctions, as required by the California Rules of Court Rule 2.30(e)" has no bearing on the validity of that order, which imposed sanctions for discovery abuses pursuant to Code of Civil Procedure sections 2023.030, subdivision (d), 2030.290, subdivision (c), and 2033.290, subdivision (e), and not for violation of an applicable court rule.

D. Plaintiffs' attempted substitution of counsel

The trial court's denial of plaintiffs' procedurally improper attempt to substitute themselves as pro. per. litigants in place of their counsel of record did not deny plaintiffs due process or invalidate the terminating sanctions order. A client who consents to an attorney's withdrawal may effect such withdrawal by signing and filing a mandatory Judicial Council Form MC-050, "Substitution of Attorney--Civil" in the pending action. (Tuft, et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2018) ¶ 10:76, p.10-15; Code Civ. Proc., § 284, subd. (1); *In re Haro* (1969) 71 Cal.2d 1021, 1029.) The record on appeal contains no such form, nor is there any indication in the record that plaintiffs were at any time precluded from filing the requisite form. The record discloses no due process violation, and the trial court did not abuse its discretion by denying plaintiffs' procedurally improper ex parte request for substitution of counsel. (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

II. Motion for reconsideration

The trial court did not abuse its discretion by denying plaintiffs' motion for reconsideration of the April 24, 2017 discovery order. A motion for reconsideration of a court order must be made within 10 days after service upon the party affected by the order and must be based on new or different facts, circumstances, or law. (Code Civ. Proc., § 1008, subd. (a).)

Plaintiffs were served with notice of the discovery order by mail on April 24, 2017. Their motion for reconsideration, filed on May 23, 2017, was untimely and failed to state any new or different facts, circumstances, or law.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT